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No. 03-986

IN THE

Supreme Court of the United States

MICHAEL E. BLOOMBERG, Mayor of the City of New York, MARVA HAMMONS, Administrator of the New York City Human Resources Administration and Commissioner of the New York City Department of Social Services and MARY E. GLASS, Commissioner of the New York State Department of Social Services,

Petitioners,

v.

HENRIETTA D., NIDIA S., SIMONE A., EZZARD S., JOHN R., PEDRO R., on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit err in affirming the district court's finding, after trial, that Petitioners violated the federal disability statutes in failing to provide Respondents with reasonable accommodations necessary to ensure them access to the same public assistance benefits offered to all eligible New York City residents?

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STATEMENT OF FACTS

The essence of Petitioners' request for *certiorari* is a disputation of the lower court's findings of fact, and the Second Circuit's affirmance of those findings. For this reason, Petitioners' brief is rife with factual arguments, as well as misrepresentations of the facts affirmed below, beginning with Petitioners' misleading "Question Presented." Because the facts of this case are generously recounted in the decisions below, and because such factual claims provide no basis for *certiorari*, Respondents will only briefly set the record straight.

The chronic, debilitating nature of AIDS makes it difficult or impossible for many indigent individuals living with AIDS to negotiate governmental bureaucracies in order to access and maintain their subsistence benefits. Respondents, a class of more than 31,000 indigent New York City residents living with AIDS, accordingly require reasonable modifications to the City's policies and procedures, or a "ramp," to ensure them equal access to the benefits for which they qualify. Petitioners acknowledged this need and created the Division of AIDS Services and Income Support ("DASIS"), a specialized public assistance case management unit, to serve as that ramp to their benefits. Respondents filed this lawsuit in 1995 because DASIS was failing to provide the reasonable modifications it was intended to provide, effectively denying Respondents meaningful access to the same benefits and services provided to other eligible New York City residents, with life-threatening consequences.

At trial, the District Court heard testimony, which it found credible and compelling, from representative class members, community-based representatives, and medical and statistical experts describing both (i) the need to provide reasonable accommodations to Respondents to enable them meaningfully

to access the public assistance benefits provided by the State[1] and City of New York, and (ii) the utter failure of Petitioners to provide those necessary accommodations. The District Court found:

> The evidence presented demonstrated an alarming failure to provide plaintiffs with the intensive case management and assistance that DASIS was intended to provide. In the unsatisfactory performance of these services, DASIS cannot ensure plaintiffs meaningful access to their subsistence benefits. . . . The plaintiffs, the community-based representatives, and defendants[']own data painted a picture of an agency that routinely fails to provide access, meaningful or otherwise, to its clients. DASIS' systemic failure to provide its clients with meaningful access to their benefits and services was also conclusively established through defendants' own quality assurance data.

(PA145[2] (citations omitted); *see* PA43 (Second Circuit affirming district court's "specific findings to the effect that qualified plaintiffs cannot obtain benefits without aid, and that the current accommodative regime is dysfunctional.").)

A. The Need for Reasonable Modifications and the Creation of DASIS to Ensure Respondents Meaningful and Equal Access to Critical Subsistence Benefits.

The unique characteristics of AIDS make it extremely difficult or impossible for persons living with AIDS to access

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1. The State Defendant in this matter chose not to seek review of the Second Circuit's decision.

2. Numbers in parentheses preceded by "PA" refer to pages of the Petitioners' Appendix. Numbers in parentheses preceded by "JA" refer to pages of the Joint Appendix for the proceedings below.

and negotiate systems with "onerous application processes, ongoing documentation requirements, frequent mandatory office appointments," infection-ridden waiting rooms, and understaffed offices with overworked employees who lack training to understand or accommodate the special needs of persons living with AIDS. (JA843.) Accordingly, Respondents require reasonable modifications of Petitioners' policies, practices, and procedures to assure equal and meaningful access to the social welfare benefits for which they qualify:

> Given plaintiffs' disability and, in particular, the ease with which even minor infections can profoundly threaten their health, it is clear that defendants must provide Food Stamps, Home Relief, and other public assistance benefits in some modified fashion to these plaintiffs. . . . The goal of DAS[IS] is to facilitate HIV positive clients who are ill through the complex maze of social services that provides the variety of public assistance benefits to which plaintiffs are entitled.

(JA384-85.) It is essential, finally, that Respondents receive the subsistence benefits to which they are entitled in a timely manner.

In recognition of the special needs of persons living with AIDS, the City of New York created DASIS in 1985 as a specialized case management unit with, *inter alia*, low case manager-to-client ratios and a single point of access to obtain and maintain social welfare benefits. (JA46.) Petitioners, in fact, admitted this at trial: "DASIS itself is a reasonable modification of the public assistance programs administered by HRA to all non-DASIS clients." (JA1772.)

B. DASIS Administers Overwhelmingly the Same Benefits and Services Provided to the Non-disabled.

Petitioners chiefly seek to obtain from this Court a factual determination that DASIS is "directed solely to the provision of enhanced benefits to a class of disabled persons" (Pet'rs Br. at i), a patently false proposition that Petitioners themselves contradict repeatedly.[3] The courts below firmly settled this question, as to which the record leaves no doubt. As the Second Circuit opined: "[W]e agree . . . with the District Court that the overwhelming purpose of DASIS is to provide access to public benefits available to all. . . ." (PA47.) Indeed, DASIS administers overwhelmingly the same benefits and services provided to the non-disabled, including Food Stamps, Medicaid, Medicare, Emergency Assistance, Immediate Needs Grants, and cash assistance through the Family Assistance Program and the Safety Net Assistance Program. (JA1699h.)

DASIS also administers numerous other benefits that Petitioners have labeled "CBCFA";[4] these benefits are not DASIS-specific. Petitioners have confused the process by which DASIS administers these benefits with the underlying substantive benefits. CBCFA benefits are provided to all eligible

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3. (*See, e.g.*, Pet'rs Br. at 3 ("In addition to providing *the same public assistance benefits to financially eligible DASIS clients that are available to financially eligible able-bodied clients through the City's other public assistance programs*. . . .") (emphasis added); Pet'rs Br. at 14 ("DASIS clients receive at least the same TANF and Safety Net, Medicaid, and Food Stamp benefits received by public assistance clients not serviced by DASIS.") (citation omitted); Pet'rs Br. at 23 ("the DASIS program is a hybrid insofar as it provides enhanced benefits in some categories").)

4. This acronym stands for Case-By-Case Financial Assessment (*see* JA1807), and merely denotes that these benefits are assessed on a case-by-case basis; it does not indicate that these are exclusively DASIS benefits. (*See* JA1806-07.)

New York City residents, disabled and non-disabled alike, and not merely DASIS clients.[5] As the District Court expressly found: "Defendants repeatedly emphasize the nutritional and transportation allowance, which only DASIS clients receive, while ignoring the vast majority of benefits and services that plaintiffs receive which are precisely the same as those received by the non-disabled." (PA150.) In any event, as discussed *infra* (*see* Point I), Petitioners made no claim to "enhanced" benefits; the Second Circuit expressly ruled that "the District Court did not find any right under the ADA to access the 'additional' benefits" (PA46); and "the injunction in this case did not provide the plaintiffs with substantive benefits above and beyond those facially available to all qualifying individuals." (PA63.)

C. Testimony of Representative Plaintiffs, Community-Based Organizations, and Drs. Ernest Drucker and Tanya Zangaglia.

As the District Court found, each of the representative plaintiffs described how Petitioners denied them meaningful access to life-sustaining public benefits and services. (PA90-

5. "Clothing Allotments," which Petitioners label a CBCFA benefit, are available to all eligible New York City residents, not just DASIS clients. *See* 18 N.Y.C.R.R. § 352.7(d) (clothing allotments for public assistance recipients). *See also* 18 N.Y.C.R.R. §§ 352.6, § 352.7 (home establishment and furnishing benefits); 12 N.Y.C.R.R. § 1300.4 (transportation, work-related expense, child care, case management, and medical assistance benefits); 18 N.Y.C.R.R. § 352.3 (rental assistance); 18 N.Y.C.R.R. §§ 352.7(g)(3), (4), § 370.3(a)(5), § 397.5(l)[3]) (payment of rent arrears); 18 N.Y.C.R.R. Part 372 (emergency assistance for families with dependant children, including rent arrears); and "Miscellaneous" other benefits, not specifically enumerated by Petitioners in their Quarterly Performance Report but certainly not DASIS-specific. Petitioners also track "Voluntary Departure Requests" as a CBCFA. Voluntary Departure is provided for under 8 U.S.C. § 1229c; there is no specific provision exclusively for DASIS clients.

111; PA143.) They told chilling stories of homelessness and hunger. Three of the witnesses detailed the manner in which DASIS' failure properly to assist them worsened their already serious illness because of their inability to sustain necessary medical regimens, exposure to the elements, lack of nutrition, and unimaginable stress. All four made clear that DASIS failed to provide them with any case management, much less intensive case management. For example, Petitioners wrongfully denied Mr. Henry Bradley access to Food Stamp benefits for almost two years (JA1204-06, JA1216-17), and for two years he was wrongfully unable to access the life-sustaining Medicaid benefits to which he was fully entitled. (JA1167-68, JA1185-89, JA1190-92, JA1196.) Because he could not afford his medication, his toenails, fingernails, and even his teeth, fell out. (JA1167-68.)[6] Mr. Bradley's rights to these benefits were unequivocally established in fair hearing proceedings, which DASIS repeatedly ignored. (JA1185-89, JA1190-92, JA1204-06, JA1231-34, JA1238-40.) Indeed, DASIS' own witness admitted that it was DASIS' policy to disregard fair hearing decisions. (JA1886-87.)

The District Court found each of the representative witnesses to be credible not only because, as Petitioners note in their brief, the District Court "essentially accepted all of their testimony as true" (Pet'rs Br. at 7), but also because their testimony was largely unrefuted. As the Second Circuit noted, their testimony was further supported by the testimony of community-based representatives and by the expert reports and testimony of Dr. Ernest Drucker and Dr. Tanya Zangaglia. (PA13-14.)

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6. Even a short time without those AIDS medications may cause serious complications. (JA4735 n.18.)

D. Statistical Proof of the Systemic Failure by DASIS to Deliver Timely Benefits.

The systemic nature of DASIS' failure to provide New Yorkers disabled by AIDS meaningful access to subsistence benefits and services was established by statistical evidence presented at trial. *Petitioners' own performance-tracking reports revealed that, system-wide, DASIS failed to provide eligible clients critical benefits within legal time frames **33%** of the time.* (PA123.) The District Court emphasized that "[e]ven more egregious, the Amsterdam, Kingsbridge and IHSU Waverly centers all failed timely to deliver benefits 44.6%, 45.4% and 46.9% of the time, respectively," and set out a detailed summary of timeliness of delivery of benefits for all applications at the various DASIS centers. (PA124; *see* JA1721, JA1723, JA2180, JA2182.) As the District Court observed:

> In practical terms, this means that thousands of indigent New Yorkers living with AIDS stand an almost fifty-fifty chance of having their rights violated by this agency – rights to critical subsistence benefits for which they have been determined fully eligible. It is noteworthy that these figures are based upon defendants' own data. . . .

(PA146.) In addition, for various reasons that the District Court explained, these figures likely understate the problem, and "the actual length of time between submission and issuance is likely greater than reported." (PA125-26; *see* JA1724-25, JA1743-44, JA2011-12.) Statistical proof presented at trial was found to "provide probative evidence of delays that are typical and systemic," (PA121), and to "credibly demonstrate systemic problems in DASIS' efficient and timely administration of benefits." (PA128.)

Finally, Petitioners submitted no evidence that they are fulfilling their obligation to provide Respondents with meaningful access to the benefits and services they administer. It is quite telling, for example, that in the more than five years that this case was pending, Petitioners did not commission a single study to demonstrate their compliance with the law. Meanwhile, the only data that Petitioners did compile, which Petitioners produced "literally on the eve of trial," clearly established their systemic failure to provide Respondents with timely access to critical subsistence benefits. (PA150.)

REASONS FOR DENYING THE PETITION

Petitioners contend that the Second Circuit misread the ADA's "reasonable modifications" requirement by requiring them to provide people with AIDS better treatment than that provided to non-disabled benefits recipients. For four fundamental reasons, that contention provides no basis for a grant of *certiorari*. *First*, the Second Circuit squarely held that the injunction it affirmed did not grant Respondents any additional substantive benefits. *Second*, Petitioners do not even attempt to identify a single case decided by another circuit that is in conflict with the Second Circuit's decision here; every single out-of-circuit case cited by Petitioners ruled for the plaintiffs, as the Second Circuit did here. *Third*, this Court has at least twice held that the ADA mandates some accommodations that provide people with disabilities different treatment than that provided to the non-disabled. And *finally*, Petitioners' contentions are academic in any event, for Petitioners did not challenge the now-affirmed state-law claims that independently support the injunction under review. In short, Petitioners seek nothing more than to reexamine the Second Circuit's application of established law to a complex set of facts and to second-guess the evidentiary decisions of two lower courts. Nothing in Petitioners' brief provides a basis for *certiorari* as set forth in Rule 10 of the Supreme Court.

I. THE DECISIONS BELOW EXPRESSLY REQUIRED THAT PETITIONERS AFFORD RESPONDENTS EQUAL AND MEANINGFUL ACCESS TO THE VERY SAME BENEFITS AND SERVICES PROVIDED TO THE NONDISABLED.

The instant petition is largely based upon the revival of a factual argument that Petitioners repeatedly advanced below. Specifically, Petitioners argue that Respondents "take issue with the amount of benefits" that they receive (Pet'rs Br. at 19), and that "[Respondents] sought . . . substantive benefits not provided to the able-bodied." (Pet'rs Br. at 16; *see also* Pet'rs Br. at 14 ("the dispute centers on the amount of benefits and services provided").) This argument is fundamentally incorrect, and both the Second Circuit and the District Court expressly rejected this factual contention. In fact, both the Second Circuit and the District Court emphasized that Respondents did not seek, and the Order did not compel DASIS to provide, access to additional or better benefits than provided to the non-disabled:

> [W]e do not construe the injunction of the District Court in fact to order access to any of the additional benefits provided only to the plaintiff class. The overall discussion of the opinion and the language of the injunction make clear that the District Court's holding does not ultimately embrace so broad a theory of accommodation. The District Court recognized that the "[p]laintiffs have made no claim under the ADA or the [Rehabilitation] Act for additional or better benefits and services than provided to the non-disabled. To the contrary, plaintiffs' ADA and [Rehabilitation] Act claims seek meaningful access to the *very same benefits and services* provided to the non-disabled. Plaintiffs seek, and this Court requires, only the modifications –

> such as intensive case management and low case manager-to-client ratios – required to ensure meaningful access to the same benefits and services." The injunction itself specifically limits the "benefits and services" to which it orders access to "public assistance, Medicaid, Food Stamps, housing, and other *benefits and services available to qualifying members of the general public* comparable to public assistance and welfare benefits." (emphasis added). This language restricts the injunctive relief to benefits available to both the plaintiffs and the eligible non-disabled.

(PA44-46 (quoting PA151) (citations omitted).) The courts could hardly have been clearer. Lest there be doubt, however, the Second Circuit reiterated:

> [W]e note that we do not read the injunction to require provision of extra substantive benefits unavailable to the non-disabled – including, without limitation, enhanced rental assistance, nutritional supplements, and transportation allowances – nor do we construe it to permit an action based on procedural ineffectiveness if the ineffectiveness relates solely to [the] provision of such "additional" substantive benefits.

(PA46.)[7]

Hence, not only did Respondents never seek access to "enhanced benefits," but the order and decisions below unequivocally precluded such a claim. Petitioners wish to mire

7. In fact, this issue was settled well before trial. (*See* JA855.) ("Plaintiffs do not challenge the amount or adequacy of the benefits available to them; they seek equal and meaningful access to benefits already available to them.").

the Supreme Court in a factual dispute over the nature of the benefits at issue in this case, a factual dispute firmly resolved below and by its nature of absolutely no national significance. This is hardly an appropriate matter for Supreme Court review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

II. THE LOWER COURTS APPLIED THE ACCEPTED RULE OF LAW IN HOLDING THAT RESPONDENTS ARE NOT REQUIRED TO PROVE DISPARATE TREATMENT OR IMPACT UNDER THE FEDERAL DISABILITY STATUTES.

Petitioners argue – without any support – that the lower courts erred in rejecting Petitioners' argument that Respondents must prove disparate treatment or "disparate impact" to prevail under the federal disability statutes. (Pet'rs Br. at 21.)[8] Petitioners argue that Respondents' case must fail for lack of proof of "discrimination by the City against them as compared with the able-bodied." (Pet'rs Br. at 12; *see also* Pet'rs Br. at 25 ("failure to offer evidence of a disparity is fatal to plaintiffs' claim"); Pet'rs Br. at 23 ("[U]nless they can demonstrate discrimination in that they are being treated less favorably than others because of their disability, they have not stated a claim under the ADA.").) Petitioners are wrong: the Supreme Court and every single court to address this issue has rejected Petitioners' narrow conception of the disability statutes. Courts – including numerous circuit

8. Petitioners use the term "disparate impact," but their argument more accurately relates to disparate treatment, as evidenced, *e.g.*, by their contention that they "were precluded from demonstrating *equality of treatment* in the provision of services. . . ." (Pet'rs Br. at 18 (emphasis added).) Indeed, as Petitioners' brief suggests, the City amended its "facially neutral policies" in 1985 by creating DASIS as a "reasonable modification to its welfare program" and policies. (Pet'rs Br. at 21.)

courts – have *uniformly* held that plaintiffs need not allege or prove disparate treatment or impact in order to establish a claim of discrimination under the federal disability statutes. Rather than conflict, there is unanimity in the courts on this matter.

Petitioners' argument stems from a fundamental misconception of the federal disability statutes: "The statutes do not require public entities to meet the greater needs of this disabled population, but rather require that they provide the disabled with *the same access* to the identical benefits provided to the able-bodied and otherwise disabled." (Pet'rs Br. at 13 (emphasis added).) Providing "the same access" to the mobility-impaired without the reasonable accommodation of a ramp, or to the hearing-impaired without the reasonable accommodation of an interpreter, however, results in the exclusion of the disabled, even if unintentional, from the identical benefits and services.

Thus, as this Court explained in *Alexander v. Choate*, 469 U.S. 287 (1985), petitioners must do more than provide access; they must provide "meaningful access" and "reasonable accommodations" on account of respondents' disability: "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. . . . [T]o assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Alexander v. Choate*, 469 U.S. 287, 301 (1985)[9];

9. In *Alexander*, plaintiffs challenged a facially neutral reduction in benefits to all recipients, seeking greater benefits for themselves (21 rather than 14 days of benefits). Because the plaintiffs had "meaningful and equal access" to the same benefits provided to the non-disabled, the Court refused to grant plaintiffs relief. Here, Respondents did not seek to change the underlying benefit to which they are entitled, or "to alter th[e] definition of the benefit being offered." *Alexander*, 469

(Cont'd)

see Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982) ("It is not enough to open the door for the handicapped . . . ; a ramp must be built so the door can be reached.") (citation and internal quotations omitted). Contrary to Petitioners' suggestion, the Second Circuit not only duly considered *Alexander*, but expressly relied upon it. (PA24 ("Our analysis of the requirements of a reasonable accommodations claim begins with the Supreme Court's opinion in *Choate*.").)

Consonant with the principle announced in *Alexander*, the Justice Department's implementing regulations expressly require covered entities to make "reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability. . . ." 28 C.F.R. § 35.130(b)(7).[10] As the Second Circuit observed, "[Petitioners] have not challenged the validity, nor directly challenged the

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(Cont'd)

U.S. at 303. Rather, Respondents sought equal and meaningful access under the federal disability statutes to the *same* benefits that the non-disabled receive. Under such circumstances, as *Alexander* established, "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id.* at 301. It is for this reason that the lower courts cited *Alexander* in rejecting Petitioners' claim. (*See* PA43; JA382.)

10. The Second Circuit cited several additional implementing regulations establishing that

> [A] public entity is not only prohibited from affording to persons with disabilities services that are "not equal to that afforded others," [28 C.F.R.] § 35.130(b)(1)(ii), or "not as effective in affording equal opportunity," [28 C.F.R.] § 35.130(b)(1)(iii), but also cannot prevent a qualified individual with a disability from enjoying "any aid, benefit, or service," [28 C.F.R.] § 35.130(b)(1)(i), regardless of whether other individuals are granted access.

(PA27.)

reasonableness, of [the Justice Department's] regulations." (PA27.) Hence, while a showing of disparate treatment or impact might constitute discrimination under the acts, Respondents based their claim on Petitioners' failure to provide the reasonable accommodations or modifications required by law, and the Justice Department's regulations "do not require a showing of disparate impact in reasonable accommodation cases." (PA25.)

Not surprisingly, this Court explicitly rejected Petitioners' narrow interpretation of the concept of "discrimination" under the ADA in the case of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). In *Olmstead*, the majority rejected the argument that plaintiffs must demonstrate disparate treatment or impact to establish discrimination under the ADA:

> Nor were they subjected to "discrimination," the State contends, because "'discrimination' necessarily requires uneven treatment of similarly situated individuals," and [plaintiffs] had identified no comparison class, *i.e.*, no similarly situated individuals given preferential treatment. *We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.*

Id. at 598 (emphasis added) (citation omitted); *see also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially.") (emphasis in original). Contrary to Petitioners' suggestion, moreover, this was the opinion of the Court and not a "plurality opinion." (Pet'rs Br. at 10.) *Olmstead* firmly supports the Second Circuit's

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ruling, supported by every case to examine the issue, that "discrimination" under the ADA includes not only disparate impact or disparate treatment, but failure to make "reasonable modifications in policies, practices or procedures." 28 C.F.R. § 35.130(b)(7). Once again, the instant petition involves a decision wholly consistent with Supreme Court precedent, rather than one "that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Similarly, this petition does not remotely involve a court of appeals decision "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). To the contrary, as noted, every court to examine this issue – both before and after *Olmstead* – has likewise recognized the distinction between a claim based upon the failure to provide reasonable accommodations[11] and a claim

11. Petitioners' attempts to distinguish cases decided under Title I of the ADA are unavailing and unprincipled. The reasonable accommodation/modification requirement, upon which this case is based, is embodied in, and thus equally applicable to, all three Titles of the ADA, as these cases suggest. This includes Title II, which requires: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. . . ." 28 C.F.R. § 35.130(b)(7). *See, e.g., Washington v. Indiana High Sch. Athletic Ass'n Inc.*, 181 F.3d 840, 848 (7th Cir.) ("Congress clearly intended the failure-to-accommodate method of proving discrimination to apply to Title II."), *cert. denied*, 528 U.S. 1046 (1999); *Theriault v. Flynn*, 162 F.3d 46, 53 n.10 (1st Cir. 1998) ("Congress clearly did not intend to give public entities more latitude than private parties to discriminate against the disabled.") (citation omitted). This is apparent not only in the implementing regulations, and in the uniform case law under all three titles (including *Olmstead*, a Title II case), but from the Congressional record itself. *See* H.R. Rep. 101-485, at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 367 ("The Committee intends [] that the forms of discrimination prohibited by [Title II] be identical to those set out in the applicable provisions of titles I and III of [the ADA].")

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of disparate treatment or disparate impact. These courts – including the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia Circuits – have uniformly ruled that a plaintiff need not prove disparate treatment or impact to prevail. *See, e.g.*, *Thompson v. State of Colorado*, 278 F.3d 1020, 1028 (10th Cir. 2001) ("[R]ather than preventing public entities from treating the disabled differently than the nondisabled, Title II requires that public entities make certain accommodations for the disabled in order to ensure their access to government programs."), *cert. denied*, 535 U.S. 1077 (2002); *Id.* at 1031; *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 256 (1st Cir. 2000) ("[U]nder the ADA, the term 'discriminate' includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.") (citation and internal quotations omitted); *Id.* at 256-57 ("Unlike other enumerated constructions of 'discriminate,'" this construction does not require "proof of a particularized discriminatory animus"; instead, discrimination may be proved through "any failure to provide reasonable accommodations for a disability"); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646 n.9 (1st Cir. 2000) ("[Defendant's] argument that there was no intent to discriminate based on disability misses the important point that the ADA does more than prohibit disparate treatment. It also imposes an affirmative obligation to provide reasonable accommodation to disabled employees.") (citation omitted); *Boersig v. Union Elec. Co.*, 219 F.3d 816, 822 (8th Cir. 2000) (recognizing difference between reasonable accommodation claim and disparate impact claim), *cert. denied*, 531 U.S. 1113 (2001); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999) ("Discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff's disabilities."); *Cathcart v.*

Flagstar Corp., 155 F.3d 558 (table), No. 97-1977, 1998 WL 390834, at *9 (4th Cir. June 29, 1998) ("'Discrimination' as used in the ADA prohibits not only disparate treatment . . . but also the failure to make 'reasonable accommodations to the known physical or mental limitations of . . . an applicant or employee.'") (citations omitted); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (noting that reasonable accommodation claims rely on legal standards distinct from disparate treatment claims); *Zimring v. Olmstead*, 138 F.3d 893, 899 (11th Cir. 1998) ("The ADA does not only mandate that individuals with disabilities be treated the same as persons without such disabilities. Underlying the ADA's prohibitions is the notion that individuals with disabilities must be accorded reasonable accommodations *not* offered to other persons in order to ensure that individuals with disabilities enjoy 'equality of opportunity, full participation, independent living, and economic self-sufficiency.'") (citations omitted) (emphasis in original), *aff'd in part and vacated in part by* 527 U.S. 581 (1999); *Bultemeyer v. Fort Wayne Cmty. Schools*, 100 F.3d 1281, 1283 (7th Cir. 1996) ("[T]his is not a disparate treatment claim, but a reasonable accommodation claim, and it must be analyzed differently. [Plaintiff] is not complaining that [defendant] treated him differently and less favorably than other, non-disabled employees. He is not comparing his treatment to that of any other [of defendant's] employee. His complaint relates solely to [defendant's] failure to reasonably accommodate his disability."); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1179 n.5 (6th Cir. 1996) (explaining that "Plaintiffs may proceed on any one or more of several theories of discrimination," including disparate impact *or* failure to provide reasonable accommodation); (PA153-54 (collecting cases).)

Petitioners cannot, and do not, cite a single case in opposition to this established principle. Nonetheless, wholly without support, Petitioners argue that it is "this Court's

unequivocal position that an ADA or Rehabilitation Act claim must rest on the discrepancy between services provided to plaintiffs and those offered to the able-bodied." (Pet'rs Br. at 13.) Of course, this Court has never remotely ruled that plaintiffs must prove disparate treatment or impact, or a "discrepancy between services," in order to establish a claim under the federal disability statutes.

Petitioners then fancifully assert that the Second Circuit's decision in this matter is in "direct" conflict with its decision in *Wright v. Giuliani*, 230 F.3d 543 (2d Cir. 2000), regarding the alleged need for evidence of disparate treatment. (Pet'rs Br. at 14-16.) Such a purported *intra*-circuit conflict, while possibly a basis for *en banc* review in the Second Circuit, provides no grounds for review in this Court. In any event, there is no such conflict: the *Wright* court specifically declined to decide the issue Petitioners raise here. *See Wright*, 230 F.3d at 549 (remanding but stating that the court "need not decide" whether disparate treatment analysis "is helpful"). This explains why the Second Circuit did not even feel compelled to cite, much less to distinguish, *Wright* in its decision in this matter, and why not a single judge on the Second Circuit requested that a vote be taken on Petitioners' motion for a rehearing *en banc*, including the judges who decided *Wright*. (*See* PA174.)

The proposed testimony of Patricia Smith was irrelevant to the legal claim at bar, and the proper exclusion of that testimony is hardly a matter for Supreme Court review. Ms. Smith was to testify concerning the "policies and procedures with respect to giving public assistance to [non-disabled] city residents" (JA1653), for the purpose of refuting what Petitioners perceived to be Respondents' claim of disparate treatment. (*See* Pet'rs Br. at 18 ("City defendants . . . were precluded from demonstrating equality of treatment in the provision of services to DASIS clients and to other public assistance

clients."); *id.* at 9 (Smith "was prepared to testify that plaintiffs' class received equal provision of services as compared with non-DASIS public assistance clients").) Under oath before trial, Ms. Smith professed no knowledge of DASIS or of the dispositive question whether DASIS was providing its clients with meaningful access to their subsistence benefits. (JA880.) Her purported testimony regarding the process by which subsistence benefits are provided to the non-disabled was premised upon Petitioners' erroneous interpretation of the disability statutes, was irrelevant to the case, and was thus properly excluded. As the Second Circuit concluded: "We do not believe that Smith's testimony would have materially affected the analysis of the reasonableness of the accommodation." (PA42 n.10.); *See, e.g.*, *Bultemeyer*, 100 F.3d at 1283 ("[Plaintiff] is not complaining that [defendant] treated him differently and less favorably than other, non-disabled employees. *He is not comparing his treatment to that of any other [of defendant's] employee*. His complaint relates solely to [defendant's] failure to reasonably accommodate his disability."). In addition, as the Second Circuit also explained,

> where testimonial evidence has made clear that the offered accommodation is highly ineffectual, it is no defense that others are equally unsuccessful in accessing benefits. . . . [T]he fact that individuals other than the class members have been unable to obtain benefits does not of itself demonstrate that the plaintiffs do not face conditions that are more onerous for them because of their particular disabilities. The absence of disparate impact would not prove that DASIS is effective enough to provide benefits under a state of affairs where the social services system functioned smoothly.

(PA38.)

Finally, Petitioners perfunctorily argue that there was insufficient evidence to determine whether "any further accommodations demanded by plaintiffs were 'reasonable' or would 'fundamentally alter the nature of the program or would pose an undue hardship.'" (Pet'rs Br. at 20.) As both the Second Circuit and the district court explicitly noted, however, Petitioners never advanced this argument at trial, because Respondents plainly did not seek any "further accommodations" that would in any way alter the nature of Petitioners' program or pose a burden. (PA41 ("The defendants in this case have not, however, alleged that the proposed accommodation would cause them or their programs undue hardship."); PA141 n.17 ("Defendants provided no evidence that DASIS and its special functions represent[] a fundamental alteration of defendants' service, program, or activity. The reasonableness of the modifications that plaintiffs seek, moreover, is evidenced by the fact that virtually all are modifications that defendants have long purported – but failed – to provide, and that they are now required by local law to provide.").) In fact, Respondents merely sought to compel Petitioners to comply with the law and their own policies and procedures: to serve as the ramp that DASIS has always purported to be. Accordingly, the District Court did not order a single "further accommodation[]," or a single modification in the manner in which DASIS functions. Petitioners' argument regarding fundamental alteration is thus wholly without support.

III. PETITIONERS' CONTENTIONS ARE ACADEMIC.

As the Second Circuit noted, "the District Court also found the city defendants liable for violations of . . . the New York State Social Services Law and its implementing regulations and administrative directives, based on the city's repeated terminations of welfare benefits without adequate notice and hearing," as well as "the New York State Constitution[]."

(PA17; *see* PA162-170.) The Second Circuit affirmed the district court's finding of liability against Petitioners on these claims, which Petitioners did not challenge on the merits. (PA62-63.) These claims, based upon the same underlying factual issues as the ADA and Rehabilitation Act claims, *id.*, have been finally adjudicated and independently support the order under review, rendering the instant appeal merely academic.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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